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CHARLES ELMORE CR
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In the Supreme Court of the United States

No. 340

October Term, 1929

UNITED STATES OF AMERICA, Petitioner,

vs.

NELSON B. UPDIKE, et al.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS A. BROGAN,
ALFRED G. ELLICK,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now the respondents (except George A. Roberts and Ed P. Smith) and object to the petition for a writ of certiorari presented in this proceeding, upon the following grounds:

1. Because the petition was not presented to this court within three months from the entry of the decree of the Circuit Court of Appeals, as required by Secs. 347 and 350 of Title 28 of the U. S. Code.

2. Because the reason relied upon for allowance of the writ is not sufficient under Rule 38 of this court.

3. Because the contention that a suit against the transferees may be maintained against stockholders on the sole ground that they were transferees of the assets of a corporation, after the cause of action against the corporation itself has been ex-

tinguished by the statute of limitations, is frivolous, without merit and was fully covered by the decision of this court in *Russell vs. United States,* 278 U. S. 181; and because this court has not approved the so-called trust fund doctrine for the maintenance of suits against stockholders, but has distinctly repudiated it.

4. The construction placed by the District Court and the United States Circuit Court of Appeals upon Section 278 (d) of the Revenue Act of 1926 is in accordance with the obvious intention of Congress to place a limitation upon proceedings in court for the collection of taxes at the expiration of six years from the time the assessment was made.

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BRIEF IN SUPPORT OF OBJECTIONS

1. The application is not made within the time fixed by statute.

We are aware of the numerous decisions in which this court has held that for the purpose of review by appeal or writ of error, a judgment or decree of the lower court does not become final until a motion for new trial or petition for rehearing, properly made under the rules of the court and considered by it, has been disposed of.

We suggest that these rulings are not applicable to the present statute providing for writs of certiorari. In the numerous cases upon which the Government apparently has relied, it has been held that an appeal or writ of error can be taken only from a final judgment, and the judgment is not final while the court is considering a motion for new trial or a petition for rehearing. The amendment of February 13, 1925, (43 Statutes at Large 938) for the first time provides that it shall be competent for this court to grant a writ of certiorari "either before or after a judgment or decree by such lower court." It is apparent that the finality of a judgment or decree is no longer a prerequisite to a petition for a writ in this court, and, therefore, the reasoning of the line of cases which extended the time for an appeal or writ of error, is no longer applicable. The present statute should be construed according to its plain language, and its intent and purport. Sec. 350 Title 28 U. S. C. is free from ambiguity to the effect that no writ of certiorari shall be allowed unless application therefor be made within three months after the *entry* of such judgment or

decree. This decree was entered on the 25th day of March, 1929 (Tr. p. 399). The petition was filed in this court on August 23, 1929, five months after the entry of the decree.

> See *Toledo Co. v. Computing Co.*, 261 U. S. 399-417.

It is to be noted that in the application for stay of mandate made by the petitioner in the Circuit Court of Appeals (Tr. pp. 400-3), filed on June 3, 1929, after the overruling of the motion for rehearing, the court is requested to stay the issuance of a mandate until June 28, 1929, in order that the petition for the writ may be filed in this court prior to that date, and in the order staying the issuance of the mandate (Tr. p. 402), the stay is granted on condition that the petition should be filed in this court on or before June 28, 1929.

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2. Reason relied upon for allowance of the writ is not sufficient under Rule 38 of this court.

The sole reason relied upon for seeking an allowance of a writ of certiorari herein is one of those specified in subdivision (b) of paragraph 5 of Rule 38 of this court, to-wit:

> The Circuit Court of Appeals "has decided an important question of Federal Law which has not been, but should be, settled by this court."

This reason is only assigned in respect to one of the points raised in the Government's brief, namely that in a suit in equity under the trust fund theory against

transferees of the assets of a dissolved corporation, to collect taxes due from such corporation, the limitation provisions in Section 278 (d) of the Revenue Act of 1926 are not applicable. This is no longer an important question, nor is it one that has not been settled by this court.

It is no longer important because, as will be hereinafter disclosed, all departments of the Government have heretofore recognized and acquiesced in the doctrine that when a claim for taxes already assessed against the taxpayer, has been barred by limitation provisions in the Revenue Laws, it is barred against the transferees of the assets of such taxpayer.

Congress.

Section 280, Revenue Act 1926.

Section 311, Revenue Act 1928.

Statement of the Managers on the part of the House, in conference report to the House, dated February 22nd, 1926, pages 43-44.

Treasury Department.

G. C. M. 1029, Int. Rev. Bul. VI-2-3042

G. C. M. 4554, Int. Rev. Bul. VII-33-3848

Board of Tax Appeals.

Spencer vs. Commissioner, 11 B. T. A. 437, acquiesced in by Commissioner, Int. Rev. Bul. VII-31-3828.

Hammersly vs. Commissioner, 16 B. T. A. 68.

Wheeler vs. Commissioner, 16 B. T. A. 96.

Hynes vs. Commissioner, 16 B. T. A. 1272, approving and following opinion of Circuit Court of Appeals in this case.

Federal Courts.

United States vs. Snook, 24 Fed. (2d) 844.

United States vs. Lazenby, 5 Fed. (2d) 827.

The Treasury Department having heretofore at all times recognized this rule it must be assumed that they have been alert to proceed against all transferees, either in equity or under Section 280 of the Revenue Act of 1926, or Section 311 of the Revenue Act of 1928, within the period of limitation prescribed in the Revenue Laws upon the collection of income taxes.

Cases where they have not must now be rare, if any, other than the instant case.

It is also urged that this question will arise often should Section 280 be held unconstitutional. In this respect the Government has fully protected itself in Section 311 (d) Revenue Act 1928, wherein the running of the statute of limitations against transferees is expressly suspended "(***if a proceeding in respect of the liability [of a transferee] is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter."

The question is furthermore no longer important because, as will hereafter be shown herein, it has been settled by this court in *Russell vs. United States*, 278 U. S. 181.

For a clear, convincing and complete disposition of the points herein raised, see opinions below of Honorable T. C. Munger, D. J., 25 Fed. (2d) 746, and of Honorable G. T. McDermott, C. C. A., 32 Fed. (2d) 1.

3. Proceedings in court against transferees for the collection of taxes of the transferor are barred whenever such proceedings would be barred against the transferor.

It is suggested in the brief of the Government as a reason for granting the writ, that the case raises a question which has not heretofore been decided by this court, as to whether a provision in the Revenue Act limiting the time within which the United States may begin a proceeding for the collection of taxes, applies to a suit in equity brought by the United States under the trust fund theory against the stockholders of a dissolved corporate taxpayer. An examination of the case will disclose that the obvious reason why it has not been decided is because it is so frivolous that it has never before been raised. The Government's contention under this heading is based upon an erroneous understanding of the relations between stockholders of a corporation to whom the assets have been transferred, and the liabilities of the corporation. The revenue laws do not create any liability upon the part of such stockholders. It is not claimed that there is any liability on the part of the stockholders of a Nebraska corporation under any Nebraska laws to pay its debts. The sole liability

therefore asserted against them is that which arises under the general rules of equity, respecting the liability incurred by stockholders to whom the assets are distributed upon dissolution, without paying the debts of the corporation. This liability is not original, but is ancillary to the liability against the corporation itself. The suit is not a separate, but a dependent proceeding. In Nebraska, as in many of the other states, a proceeding against the stockholders of a corporation to collect the obligations of the latter, to the extent of assets distributed to the stockholders, is dependent upon the recovery of a judgment against the corporation and the issuance of an execution, followed by a return of no assets of the corporation.

> *Merchants National Bank v. McDonald*, 63 Neb. 363.

This court has approved the doctrine in the Nebraska case as being a part of the rules of equity jurisdiction and procedure, in the case of *Pierce vs. United States*, 255 U. S. 398. In that case it is said (p. 402): "A judgment creditor's bill is in essence an equitable execution." Again the court says in that case:

> "But when a corporation devests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied."

Moreover, this court has distinctly repudiated the trust fund doctrine relied upon by the Government in this case, which, although it still receives support in decisions of the lower courts, has never yet been reinstated by this court.

In *Hollins v. Brierfield Coal & I. Co.*, 150 U. S. 371, cited with approval by this court in *Pierce vs. United States*, 255 U. S. 398, it is said (p. 383):

> "Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."
>
> *Graham vs. LaCrosse*, 102 U. S. 148.

The theory of the Government in this case runs counter to the elementary rules of law on the subject of the relation between a debtor and a transferee of the debtor's assets. The Government cites no case in which it has ever been held that any cause of action exists against the transferee of assets, after it has ceased to exist against the principal debtor, the transferor. On the other hand, there are numerous cases holding that even when the liability against the transferor has been reduced to judgment, proceedings against a transferee must be abandoned, whenever the liability of the transferor ceases, either by the statute of limitations or by the judgment becoming dormant, or otherwise.

Dole v. Wilson, 39 Minn. 330.

Wood v. Carpenter, 101 U. S. 135.

Newell v. Dart, 28 Minn. 243.

Flagg v. Flagg, 39 Nebr. 229.

Scott v. Neely, 140 U. S. 106.

In the case last cited, the court said:

> "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment."

At the time this suit was brought, Sec. 1106 (a) of the Revenue Act of 1926 was in effect and read as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

As to whether the subsequent repeal of that section while this case was pending should operate to deprive these defendants of its effect, might be a question. If there was no cause of action against them at the time the suit was brought, because the liability against their transferor had been extinguished by this statute, it is difficult to conceive how a liability could be created by its mere repeal.

Peerless Woolen Mills, 13 B. T. A. 1119.

U. S. vs. John Barth Co., 27 Fed. (2nd) 782 (7th C C A).

But we need not rely on that section of the statute for support of the contention that the bar of the statute against the transferor extinguished the liability for all purposes.

It is a general rule of law that when in any statute which creates a liability, or in any statute amendatory or supplemental thereto, a limitation is placed upon the time for enforcing the liability, the running of the statute in that case not only bars the remedy, but extinguishes the liability.

Harrisburg v. Rickards, 119 U. S. 199.

Davis v. Mills, 194 U. S. 451.

Phillips v. Grand Trunk Ry., 236 U. S. 662.

The case of *Russell vs. United States*, 278 U. S. 181, is exactly in point. The suit was brought by the Government against stockholders of a corporation to recover taxes assessed against the corporation for the year 1918. The sole defense of the stockholders was the various statutes of limitation enacted since the taxable year, prior to the 1926 Act. The court discusses such sections as were relied upon, and reaches the conclusion that the transferees were free from liability under the five year limitation contained in the Act of 1918, and continued by the Act of 1929, and if Sec. 278 of the Act of 1924 relates only to assessments made after June 2, 1924, they were not liable. It concludes that the purpose of the

Act of 1924 was not to extend as against the transferees a limitation which had expired under the earlier acts. Obviously, therefore, the sole question presented to the court and considered and decided was whether a limitation which applied to the transferor was available to the transferee. The court held that it was. The transferor was not in court.

Referring to the *Russell* case, in the Government's brief, it is said that the decision in that case on the question raised herein should not be followed in this case, "because while it existed in the record in that case, it was not raised nor considered, either in the lower courts or in this court." If the theory of the Government on this question is so sound, it would be interesting to know why it was not raised in the Russell case, when that case was argued before this court on November 22d, 1928, or before the Board of Tax Appeals in the cases of *Hammersly vs. Commissioner* and *Wheeler vs. Commissioner,* supra, decided in April, 1929, and in *Hynes vs. Commissioner,* supra, decided in June, 1929, which was a case of identical facts with this case, whereas we find that it was being vigorously urged in this case at the trial in the District Court, before Honorable T. C. Munger, Judge, as early as March 26th, 1928, and in the Government's brief, filed in the Circuit Court of Appeals on November 9th, 1928, and was repudiated by both courts.

If it should be said, as it must, that it could not be urged in cases pending before the Board of Tax Appeals, under Section 280, Revenue Act 1926, because that section expressly made available to transferees the limita-

Note:

Hammersly v. Commissioner, 16 B. T. A. 68, acquiesced in by Commissioner of Internal Revenue, Ruling No. VIII-29-4274, Int. Rev. Bull. issue July 22, 1929.

Wheeler v. Commissioner, 16 B. T. A. 96, acquiesced in by Commissioner of Internal Revenue, Ruling No. VIII-31-4290, Int. Rev. Bull. issue Aug. 5, 1929.

tion provisions in the Revenue Laws, then we would have the anomalous and inequitable situation of Congress giving to a transferee the benefits of such limitation provisions, when proceeded against under Section 280, but denying to him the same benefits whenever the Government should elect to proceed against such transferee in a suit in equity.

The decision of this court in *United States v. Mitchell,* 271 U. S. 9, relied on by the Government in this case, does not require this court to reopen a settled question, whenever a new argument is discovered or conceived on one side or other of the controversy. That case merely holds that a question cannot be considered as disposed of in a former opinion, merely because it was in the record. But this relates to the ultimate question itself, not to mere arguments in support of a contention concerning it.

The case of *United States v. Barth Co.,* 279 U. S. 370, is clearly not in point. The suit was upon a bond in which the taxpayer and a surety had expressly contracted with the Government to pay any tax which the Commissioner should assess. The purpose of the bond was to protect the Government against the running of the statute of limitations and other contingencies which might arise, if the taxpayer were not required to pay the tax immediately. Here the transferees are not liable because of any engagement entered into by them, and personally they would not be liable at all if they had not received and had not retained assets of the corporation which ought to be applied in payment of its debts. Neither

is the case of *Talcott vs. United States,* 23 Fed. (2d) 897, in point, because that was not a suit to collect taxes, but to recover money paid by mistake.

The analogy which the Government seeks to find between this case and those cases in which it was held that the statute limiting the time when the Government might sue to set aside a patent on the public lands on the ground of fraud, did not bar a suit to recover damages for the fraud, does not exist, obviously. The two cases were independent of each other and this court has held that an election to pursue one remedy would bar the other.

U. S. v. Oregon Lbr. Co., 260 U. S. 290.

But there is no election required when a creditor pursues the assets of a debtor. See *Pierce v. U. S.,* 255 U. S. 398, where the Government in a proceeding to collect money from a corporation, had brought an equitable suit to pursue the assets in one jurisdiction, and later had brought a bill in equity against the stockholders, who were transferees of the assets, in another jurisdiction. The obvious basis for the ruling that there is no election is that the principal claim is the debt against the corporation, and suits against transferees are ancillary proceedings to enforce that debt, and relate to and are governed by the status of the debt against the transferor.

Another reason why this court has not heretofore been called upon to pass on this pseudo trust fund doctrine, is because the Government itself in numerous

rulings has held that there is the same limitation for the transferees, as the transferor.

In General Counsel's memorandum, No. 1029, Internal Revenue Bulletin, VI-2-3042, it is said:

> "The logical conclusion is that it was not the purpose of Congress to make effective against a transferee, a tax liability which at the time of the enactment of the Revenue Act of 1926, could not be asserted against the transferor taxpayer, because of the bar of the statute of limitations."

Also, in General Counsel's memorandum, No. 4554, I. R. B. VII-33-3848, p. 3, there was under discussion the question whether a transferee who had been assessed under Sec. 280 of the Revenue Act of 1926, after the tax had been barred against the taxpayer, would be entitled to a refund under Sec. 607 of that Act, which provides that any tax paid after the expiration of the period of limitation properly applicable thereto, shall be considered an overpayment and refunded. The Counsel says:

> "Under the provisions of section 280 of the Revenue Act of 1926 and section 311 of the Revenue Act of 1928, the assessment, collection, and payment of the liability, at law or in equity, of a transferee of the property of a taxpayer are subject to the same provisions and limitations as if a deficiency in tax were involved, except with respect to the period during which an assessment may be made."
>
> "Since the liability involved in the instant case was assessed after the expiration of the statutory period properly applicable thereto, the amount paid in respect to the assessment must be regarded as an over-payment."

In the case of *Marion Parsons Spencer,* 11 U. S. B. T. A. 437, a proceeding before the Board of Tax Appeals under Sec. 280 of the Revenue Act of 1926 against the transferee of the assets of the estate of a decedent, it was held that because the tax against the decedent had become barred by the provisions of Sec. 250 of the Revenue Act of 1921, there was no liability against the transferee. The opinion states: (p. 440).

> "In the proceeding before us the period of limitation for the assessment of tax against the taxpayer expired prior to the exactment of the Revenue Act of 1926; assessment against the taxpayer was made within such period; and notice of the proposed assessment of the liability against the transferee was sent to such transferee within six years after the assessment against the taxpayer and within one year after the enactment of the 1926 Act. Nevertheless, the period of limitation appearing in section 280, relative to the assessment of the liability of a transferee, is necessarily predicated upon the existence of such liability. Here, by operation of section 1106 (a) of the Revenue Act of 1926, the primary liability of the transferor was extinguished and it follows that the secondary liability of the petitioner as transferee was also extinguished. Consequently, there is no liability assessable against her under the provisions of section 280 of the Revenue Act of 1926."

There are other rulings of the General Counsel and numerous of the Board of Tax Appeals to the same effect.

It may be interesting in this connection to note that this suit was originally commenced as a suit to recover taxes, and that during its pendency an attempt was made to convert it into a suit to recover money of the United

States arising from a trust. In the petition filed April 2, 1927, (Tr. Vol. 1, p. 5), is found this language:

> "This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for Internal Revenue and the collection thereof."

On pp. 7 to 10 the pleading sets out acts upon which it bases its contention that the corporation was subject to a tax in the sum of $373,911.54, and on p. 11 it is a part of the prayer that the money received by the defendants "be applied to the payment of said taxes due and owing to the complainant."

While the case was pending, the Government, desiring to change front in this matter, obtained leave to strike out the words "arising under a law of Congress providing for Internal Revenue and the collection thereof," and insert in lieu thereof, "this is a suit in equity brought by the United States, of a civil nature." (Tr. Vol. 1, p. 12; also Vol. 1, p. 5), and also (Tr. Vol. 1, p. 160) to insert a statement that the Attorney General, as well as the Commissioner of Internal Revenue authorized and sanctioned the proceedings. This change was made upon the theory that while the Commissioner had power to authorize suits for the collection of taxes, only the Attorney General could authorize a general equity suit for trust funds belonging to the United States. To sustain this latter change, it was necessary to present to the court on the trial, a letter from the office of the Attorney General purporting to be dated and signed on March 15, 1927, before the commencement of the suit (Tr. Vol. 1, p. 157), whereas it ap-

peared upon the cross examination of the witness Kinsler, United States District Attorney (Tr. Vol. 1, p. 155-6) that the letter was prepared in February, 1928, just before the trial and while the case had been pending nearly a year, and that it was predated so it would appear to have been issued before the institution of the suit.

While this court may grant a writ of certiorari to reconcile conflicting decisions of different circuit courts of appeal, it has never felt called upon to exercise that power merely to adjust differences of opinion among counsel or solicitors representing different branches of the executive department. We need not now inquire what it was that induced the Government to lend its name to a suit against these transferees, when it had held that all other transferees under like circumstances were free from liability. But we think this court is not called upon to lend its aid to prolong these proceedings.

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4. Section 278 (d) of the Revenue Act of 1926 bars all proceedings for the collection of taxes, on the expiration of six years from the time the assessment was made.

The Section reads as follows:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Because the term "taxpayer" is used in the clause relating to an agreement, there is an attempt in the Government's brief to argue that any limitation intended by this section can be invoked only by the taxpayer, and not by the transferees against whom an indirect liability for the taxpayer's obligations may be asserted. But it is to be noted that Secs. 277 and 278 should be read together, and throughout the various sections the language is "a proceeding in court for the collection of such tax." This is found in sub-divisions (1), (2) and (3) of Sec. 277, and in sub-divisions (a), (b), (d) and (e) of Sec. 278. Nowhere is there any language confining the benefits of these limitation provisions to the taxpayer, only. It is submitted that a proceeding against a transferee to compel the application of the transferor's property to the payment of the taxes of the transferor is just as much a proceeding in court to collect a tax, as if it were against the original taxpayer himself. In *Bowers vs. N. Y. Lighterage Co.*, 273 U. S. 346, in construing the Revenue Act of 1921 which provided that: "No suit or proceeding for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed," this court held that the word "proceeding" was broad enough to include levy of a distraint. And the court held that this provision is a

part of a taxing statute, and such laws are to be interpreted liberally in favor of the taxpayer.

Turning to the meaning of Sec. 278 itself, it is not correct that the sole purpose of the re-enactment of that section was to enlarge the remedy for the Government. It did make a definite enlargement, and also just as definite a restriction. Prior to that time there was no limitation on the collection of taxes, levied under acts prior to 1924, where the taxpayer had failed to make a return or where the return was fraudulent. If it had been the intention of Congress not to disturb that condition, there would have been no reason for changing Sec. 278(d).

The main contention of the Government throughout this case is that Sec. 278 (d) does not prevent the collection by proceeding in court of taxes more than six years after the assessment, unless the assessment was made within the statutory period of limitation properly applicable thereto, and that if there was no statute of limitation applicable thereto, the section does not apply, and on the one hand, does not authorize the suit to be brought within six years after the assessment, nor does it prevent the bringing of a suit after that time.

There are several answers to make to this construction: In the first place, the return was due in March, 1918, the assessment was made in January, 1920, and at that time there was a statute of limitations properly applicable thereto, and it was made within that time. Sec. 14 of the Act of 1916, in force at the time of the assessment in question, was as follows:

"* * * every corporation, joint-stock company or association, and insurance company, computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within 105 days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint-stock company or association or insurance company immediately upon the notification of the amount of said assessment; * * *"

Congress, throughout the history of these revenue laws, has adopted different forms of limitation. In some cases the limitation is upon the right to assess, in others, upon the right to collect, and in the Act of 1916, limitation is upon the time within which the discovery must be made, and a new or corrected return made by the commissioner.

Eliot Nat. Bank v. Gill, 218 Fed. 600.

National Bank v. Allen, 223 Fed. 472.

Eliot Nat. Bank v. Gill, 210 Fed. 933.

It follows that this assessment was made within the period of limitation applicable thereto, and that it comes within the literal terms of the section we are considering.

It is true that by the Act of 1921, as cited in the Government's brief, another provision was made applicable to that assessment, and it was held in the first *Updike* case that by reason thereof no limitation run upon proceedings in law for collection. But this does not change the fact that at the time the assessment was made it was made within a period of limitation applicable thereto, and, therefore, comes within the language of Sec. 278 (d) of the 1926 Act.

As the Circuit Court in its opinion (Tr. p. 396) clearly points out, when Congress amended Sec. 278 (d) of the 1924 Act, it also amended paragraphs (2), (3) and (4) of the preceding Sec. 277. Prior to the 1926 amendments these paragraphs provided, "and no proceeding in court for the collection of such taxes shall be begun" after the period fixed in each paragraph for assessment, so that prior to 1926 the period for assessment or court action was the same; the Government had to assess or sue, or assess and sue, within the fixed period.

But in 1926, in all three paragraphs the limitation on proceedings in court were qualified by inserting the words "without assessment" so that the paragraphs now read "and no proceeding in court without assessment for the collection of such taxes shall be begun."

The conclusion which the lower court draws is therefore inescapable, that Congress fixed a period for the initial move against the taxpayer, which might be by assessment, or suit without assessment, and a different period for the second move, distraint, or court proceedings after assessment.

A broader construction of this section is that the clause in question, "within the period of limitation properly applicable thereto" was inserted for the benefit of the taxpayer, so that the section would not revive a liability, which had already been barred by statutes prescribing a limitation within which an assessment could be made, and so that it would not give the Government a right under the terms of this section, to sue for the recovery of a tax within six years after the assessment was made, if at the time of the assessment, the right to make the assessment had been barred by the limitations properly applicable thereto.

Moreover, a technical construction cannot properly be given to the words "period of limitation," so that they are applicable only to a definite period found somewhere in the statute. Congress has used this language to apply to cases where no limitation was intended, as well as where a definite limitation was fixed.

Thus, in sub-division (d) of Sec. 278 of the Revenue Act of 1924, it is provided that where the assessment of a tax is made within the period prescribed in Sec. 277 or in this section, such tax may be collected, etc. But when we look for the period prescribed in this section, we find that the only period prescribed is "at any time." Likewise, in Sec. 1009 (b) of the Act of 1924, it is provided that in case of a false or fraudulent return or a failure to file a required return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment "at any time." And in sub-division (c) of the same section it is provided that where the assessment of the tax is made within

the period prescribed in sub-divisions (a) and (b), such tax may be collected by distraint, etc., yet the only period prescribed in sub-division (b) is a period described there as "at any time."

It is an elementary principle in the construction of any statute that its meaning should be construed reasonably and with a due regard to the context and the purpose and intent. The Government is asking that a forced and unnatural construction be placed upon this section for the purpose of defeating the obvious limitation which Congress intended.

If the court is in doubt about the construction of this Sec. 278 (d) of the Revenue Act of 1926, it is proper to consider proceedings in Congress while the bill was in pending.

U. S. v. St. Paul, M. & M. R. Co., 247 U. S. 310.

Ex Parte Williams, 277 U. S. 267.

In the 1926 Act, as originally drafted, and as reported by the Committee on Ways and Means of the House to the House of Representatives, under date of December 7, 1925, no change had been made in the first sentence of Sec. 278 (d) as the same appeared in the 1924 Act. In describing the scope of that sub-division in said report, it is said under the heading, "Suits to Collect Tax":

> "Sub-division (d) provides that where an assessment of tax is made such tax may be collected by distraint or proceeding in court begun within six years of the assessment of the tax or at any time prior to the expiration of any period for collection

agreed upon in writing by the commissioner and the taxpayer."

(See page 12 of Report No. 1 of the Committee on Ways and Means of the House of Representatives on House Roll No. 1, dated December 7th, 1925).

When the "Managers on the Part of the House" made the report of the Conference Committee to the House, after the bill had passed the Senate, with Subdivision (d) re-written as aforesaid, they said:

> "Amendment No. 85: This amendment rewrites in more definite language, and correcting clerical mistakes, sub-divisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made."

(See page 42 of Conference Report to House of Representatives No. 356 accompanying House Roll No. 1 dated February 22, 1926).

For the foregoing reasons we respectfully submit that the application for a writ of certiorari herein should be denied.

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